APPENDIX.

Comments on the Terms of the Contract.

(Rec. 133) Paragraph 14 is the Paragraph of the Agreement in question that deals with the subject of restoration of benefits under Non-Can Policies. Among the provisions therein contained are the following:

> "The New Company shall from time to time transfer from funds available for its general corporate purposes to a special fund for the restoration of benefits under Non-Can Policies."

There is no provision, however, for the establishment of a general corporate purpose fund that gives any indication of funds being available for transfer. (Rec. 134.)

This transfer is to be made in such manner as the Board of Directors, with the approval of the Commissioner, may from time to time determine.

The amounts of transfers are to be such as the Board of Directors, in its discretion, shall determine to be *not* reasonably required for the reasonable, proper and *profitable* conduct of the operations of the New Company as a going concern. In short, profits come before restoration of benefits to Non-Can Policies.

There is a further provision that at the time of the examination, the Commissioner may order further funds transferred "to the extent such additional funds available for general corporate purposes are in his opinion available without interfering with the proper and profitable conduct of the business of the New Company as a going concern."

Here again, profits take precedence over restoration of benefits to Non-Can Policies, and under any and all

circumstances a transfer of funds is impossible, except to the satisfaction of the Commissioner.

These monies are to go into a special fund to be used by the New Company "with the approval of the Commissioner and in such manner as he may from time to time require for the purpose of paying additional disability benefits, etc."

To give a further air of plausibility of restoration of benefits, there is a provision for the payment of three and one-half percent. (3½%) interest per annum on the amounts restored.

Then follows the provision: "The extent and manner of the restoration so required or approved by the Commissioner shall be binding up on all holders of Non-Can Policies and all other persons interested therein." (Rec. 134.)

There is a provision that the New Company, with the approval of the Commissioner, *may* fully assume and reimburse all Non-Can Policies hereby partially and conditionally reinsured to the full amount thereof.

Then follows a provision that when the Commissioner shall determine that in his opinion the amount of the special fund contains adequate reserves for full insurance, he may order such transfer and full reinsurance.

Is it reasonable to assume that the Commissioner will in the future treat the Non-Can Policyholders more fairly and equitably than he treated them by the terms of the Contract in question, by which, as to some Non-Can Policies, as much as eighty percent. (80%) of the benefits are destroyed for the advantage and profit of other types of policies, who had no greater legal rights under their policies, in the Company assets than had the Non-Can Policies?

In order that there might not be too much of a chance

of restoration of benefits to Non-Can Policies, the Contract provides (Rec. 134):

> "The New Company shall be under no obligation to pay or restore the full benefits under Non-Can Policies as originally provided therein, except in the manner and to the extent hereinbefore described."

Again, we find in the Contract (Rec. 134, 135), the provision:

> "that if title to all or substantially all of the assets of the Accident and Health Department of the New Company shall thereafter be transferred, by voluntary act (other than by statutory merger or consolidation) or by operation of law, to any person who does not in connection with such transfer assume all of the obligations of the New Company to holders of Non-Can Policies, including obligations to restore the benefits thereunder in substantially the manner in this paragraph 14 provided, then and in that event the New Company will be deemed to have fully reinsured and assumed all of the Non-Can Policies, including the obligations to pay in full all installments of the disability benefits originally provided to persons theretofore entitled thereto."

It is thus to be seen that if a statutory merger or consolidation takes place, there is no reinsurance by the New Company.

What the nature and the financial responsibility of the merging and consolidating Company may be, or the terms or conditions of the merger, are shrouded in doubt and uncertainty.

There is even no obligation on the part of the New Company, in case of merger or consolidation, to see to it that the Company resulting from the merger or consolidation, is obligated to restore the benefits to Non-Can Policyholders.

It would be quite permissible, under the language above referred to, to dispose of all of the assets of the New Company, which have not been allocated to the Accident and Health Department, and thereby deprive itself of the means otherwise specified in the Agreement for restoration of liability on Non-Can Policies.

While the New Company agrees to pay claims against the Conservator or Liquidator (Rec. 136-137), the Agreement does not obligate the New Company to pay the claim of any claimants, unless and until they are filed with and approved to the satisfaction of the Commissioner and allowed by him.

This provision, of course, clearly has a tendency to try to force Non-Can Policyholders who do not accept insurance in the New Company and who reside outside of California, to abandon any attempt to establish their claims in their own domicile and go to the trouble and expense of establishing such claim before the Commissioner as he may be *satisfied* to allow them (Rec. 137).

Even when claims are filed and established to the satisfaction of the Liquidator, the New Company is under no obligation to pay them in full, except as provided in Paragraph 14.

As the contract provides (Rec. 137):

> "(c) Any remaining amount necessary to pay any discharge the claims as aforesaid shall be paid at the time that benefits under Non-Can Policies are fully restored."

The Contract in question reads in part (Rec. 139):

> "In the event benefits under Non-Can Policies shall not theretofore have been fully restored as provided in Paragraph 14 hereof."

Then follows a provision with reference to the Liquidator paying money, derived from assets in his hands, to the New Company.

It is thus to be observed that the Rehabilitation and Reinsurance Agreement itself expresses a doubt that the provisions of Paragraph 14 will result in restoration of benefits.

At pages 140-145 of the Record, Paragraph 20, is found a provision providing for mutualization, which is so ambiguous that it leaves it doubtful as to what would become of the monies paid for stock in case of mutualization, although there is a provision in Paragraph 19 of the Agreement (Rec. 138) whereby the Conservator binds himself and any Liquidator that the proceeds of any assets received shall be used in the manner in Paragraph 19 provided.

Sub-Paragraph (b) of Paragraph 20 (Rec. 143) provides that if at any time prior to the expiration of the option to mutualize, a plan of merger, consolidation, reorganization or reinsurance of the New Company is presented which, in the opinion of the Directors of the New Company, cannot be consummated without the elimination of the mutualization provisions, then by means in said Paragraph provided, the mutualization features of the Contract may be eliminated.

It is apparent that the only tangible means that the Conservator had for the payment of claims allowed by him to his satisfaction was the stock of the New Company held by him, but even these means are subject to nullification by the terms of Sub-Paragraph (d) (Rec. 145), which provides that when the conservator or liquidator shall determine that conditions are such as to require the sale of the stock "for the protection of the estate in conservation or liquidation, the New Company, or its Policyholders, he may sell the same upon order of the Court made after a proper showing, etc."

It is thus to be observed that Non-Can Policyholders, who establish claims in any manner or proceeding other

than by allowance to the satisfaction of the Commissioner, are left wholly unprotected. Thus petitioner must prevail in the proceeding instituted by him in the Superior Court of Cook County or not at all.

Then follows a queer provision found in Sub-Paragraph (e) (Rec. 145):

> "It is the purpose, spirit and intent of this Agreement that unless the provisions for mutualization are eliminated pursuant to the provisions of Sub-Paragraph (b) of this Paragraph 20, the stock of the New Company shall not be sold or disposed of prior to restoration of benefits under Non-Can Policies, except by proceedings for mutualization, so long as a reasonable probability of completing restoration of benefits under Non-Can Policies shall continue;"

Here the Liquidator and the New Company express their doubt as to the restoration of benefits proving successful.

While the New Company makes no unqualified Agreement to restore the benefits under Non-Can Policies, it, nevertheless, does enter into such unqualified Agreement so far as its assumption of the Old Company contracts with its insurance agents is concerned, as is evidenced by Paragraph 21 of the Agreement (Rec. 145, 146).

It is thus to be seen that the Insurance Commissioner puts the Agents of the Old Company, who probably for years made their living and more out of the Old Company, above the Non-Can Policyholders.

We understand it to be the policy of all insurance laws to protect policyholders and in endeavoring to protect the Old Company agents above the Non-Can Policyholders, the Contract is contrary to the public policy of Illinois, as evidenced by its insurance laws.

It is not improbable that many Non-Can Policyholders will consider the treatment sought to be accorded to

them under the terms of the Rehabilitation and Reinsurance Agreement so unfair and dishonest, that they will have no further dealings with either the Old Company or the New Company, but will drop their policies. When added to the policies so lapsed, we take those lapsed by the death of policyholders and by others reaching the age limit of 66 and thereby lapsing the policy under its terms, there will undoubtedly come a time when there will be but little money required to restore benefits under Non-Can Policies, and it is evidently that such time was in view that the Commissioner caused to be written into the Contract Sub-Paragraph (c) of Paragraph 20 (Rec. 144) by the terms of which at any time while the stock of the New Company is held by the Conservator or Liquidator, the Old Company shall have the right to pay to the Conservator or Liquidator the full amount *then* required by the New Company to complete the restoration of Non-Can benefits, and also the amount required by the Conservator or Liquidator to complete the payment of all his claims and liabilities.

Then follows the further provision that when all liabilities are satisfied "the Conservator or such Liquidator shall upon the order of Court distribute the stock then held by him in the manner provided by law."

It is to be observed that the Old Company has not been dissolved, and any assets such as the New Company stock would become the property of the Old Company and in turn would, under this provision, be distributed to the Old Company stockholders.

The California Supreme Court said in its opinion that the Old Company could not cut down the benefits due on Non-Can Policies, but we see that by a circuitous method, the Insurance Commissioner has performed this kind service for the Old Company, and at little or perhaps no expense to it turned over the stock in the New

Company, which gives it and its stockholders in turn the entire ownership and control of the New Company.

How many years it will be necessary to keep the Non-Can Policyholders who survive this ordeal out on a limb before the law can be circumvented, it is impossible to say, but suffice it to say that the trial court finds such procedure is fair, just and equitable (Rec. 120-121). We contend that this stock feature renders the contract fraudulent in law.

This Court had occasion to pass upon a situation where rehabilitation proceedings were, like those before this Court, so conducted as to give to the Old Company stockholders an advantage in the way of stock other than that represented by cash put into the Company for the purpose of rehabilitating.

We refer to *Case, et al.* v. *Los Angeles Lumber Products Company, Limited,* 308 U. S. 106.

While the case above referred to is a statutory one in bankruptcy, as this Court notes in the decision above referred to, the rule is the same in equity, and the fair and equitable requirement does not admit of the stockholders of the Old Company having any interest in the reorganization, except such as they justly acquire by. putting new capital in to rehabilitate the Company.

We refrain from quoting any of the Opinion of Your Honors in the case last referred to, in the belief that it is sufficiently fresh in your minds to make such quotation unnecessary.

It is quite true that the trial court, in approving the Rehabilitation and Reinsurance Contract, made a finding that adequate provision had been made for restoration of Non-Can Policies. At most that finding is a guess, and that guess is predicated on the obligations contained in the Agreement itself. However the meaning and effect of the agreement is for this court to

determine for itself when, as here, the question of the impairment of the obligation of a contract, in violation of the Federal Constitution, is concerned.

It is to be noted that while a "New Company" was formed, no new capital went into that Company. Conversely, the capital and surplus of the New Company was magnanimously furnished by the Insurance Commissioner, acting as Conservator, out of the funds of the Old Company. If, as the Commissioner contends, the Old Company was insolvent, the New Company is necessarily insolvent also, if, as is now contended, the New Company has obligated itself to assume all Policies of the Old Company, even if the New Company is given time within which to "restore" the Non-Can Policies.

It is to be observed that the Commissioner, neither acting as Conservator nor Liquidator is obligated to use the capital stock of the New Company for the purpose of restoring benefits under Non-Can Policies, or paying claims filed with him and allowed.

As we read between the lines, restoration is to take place in a method not expressed in the phraseology of the Rehabilitation and Reinsurance Agreement.

In the course of human events, Non-Can Policyholders are bound to die from time to time and by the terms of these Policies (Record 9), no liability arises thereon by reason of such death unless it is occasioned through accidental means. Death from sickness creates no liability under the Policy. The Policy, itself, however, dies when its holder becomes 66 years of age, and his rights on account of future disabilities are then and there terminated in all particulars.

It seems to us, therefore, that the only definite means of restoring Non-Can benefits to any policy will be through the death of other holders of like policies or

by the expiration of such policies. When either of such events happens with sufficient frequency, the policy holders in the Old Company are given a chance to step in and avail of the results through the medium of a purchase by the Old Company of the New Company stock. (Record 144.)

We submit that had the Commissioner entertained a *bona fide* desire to treat the Non-Can Policyholders fairly, he would have seen to it that the Old Company Stockholders ~~Policyholders~~ put sufficient money into either the Old Company of the New Company to make it reasonably certain that all policies, both Life and Non-Can, should receive fair and equal treatment.

There is not a word in the Non-Can Policy (Record 8-16) that subjects the holder thereof to the rights of any other type of policyholder, so far as participating in the entire assets of the Old Company is concerned.

If the Non-Can Policyholders were not by the terms of their policies called upon to pay sufficient premiums to mature those policies, the fault lies with the officers of the Old Company and the Insurance Commissioner of California who had supervision over the rates established. Nevertheless, the Non-Can Policyholders and they alone are by the Agreement in question (to which they are not parties) required to pay the cost of the error made in establishing premium rates.

Petitioner, who took out his policy in 1921, is required to pay this cost on the basis of eighty percent. (80%) thereof, although he had already paid to the Company premiums for a period of fifteen years, but another Non-Can Policyholder, who took out his policy in 1935, and who had paid but one premium, was required to contribute on the basis of ten per cent (10%) only, to meet the cost of error on premium rates. Life policyholders, even those whose policies embodied the same

disability features as those in petitioner's policy, are not required to contribute in the slightest degree to remedy this premium rate error, and still the trial court finds that this Rehabilitation and Reinsurance Contract is fair and equitable.

To use the language of the trial court's Order (Record 115, Par. 4),

> "Adequate provision is made for each and every class of policyholders, creditors and stockholders of respondent corporation and all other persons interested in the respondent corporation." * * *
>
> And (Record 115) "That neither said Agreement, nor the plan therein embodied, discriminates unfairly or illegally in favor of any class of policyholders, creditors, stockholders or other persons interested in respondent corporation,"
>
> (Record 116) "8. Said Rehabilitation and Reinsurance Agreement and the plan embodied therein, are, and each of them is, fair, just, and equitable."

We have endeavored to ascertain when, how, and where, petitioner has anything granted to him in the Rehabilitation and Reinsurance Agreement attaining a remote relationship to a remedy for the $400.00 per month, which said Agreement attempts to take from him. May he sue at the end of five years for $400.00 per month for any period of disability occurring within that time? If so, who may he sue? May he sue in Illinois? May he sue in California?

Hypothetically, the Non-Can policyholder has in the first ten-year period following the effective date of the Agreement been continually disabled. He holds a $500.00 policy paying under the Agreement but twenty per cent of the benefits provided for by his policy. Assume, that at the end of this ten-year period, none of the $400.00 of benefits have been restored.

The Commissioner and the New Company tell him that there are no funds available under the terms of the Agreement because, if you please, the New Company has not operated at a profit, such as the New Company and the Commissioner had in mind in entering into the Agreement.

May the policyholder then sue? If so, who may he sue, and for how much may he sue?

If the Commissioner accords the same type of treatment to Non-Can policyholders of the first group shown at page 132 of the Record, to which group petitioner belongs, as he is there shown to have meted out to said group, and treats that group with the same consideration in the matter of the restoration of benefits, which is largely left to the action of his unbridled will, and having in mind that by the terms of the Rehabilitation and Reinsurance Agreement he accorded to that group twenty per cent of the benefits specifically and unqualifiedly provided to be paid to them by the terms of their policies, which policies did not subordinate their rights to those of any other policies, so far as the assets of the Old Company were concerned, what will he do to them now where, instead of having a vested payment of $500.00 per month in case of disability, the procedure for restoration is nebulous and uncertain and subject to the will of the Commissioner on the one hand and that of the Board of Directors of the New Company on the other. What remedy is left for this group that can be enforced in an action at law?

We submit that it may be well said here, as was said elsewhere, "Leave all hope behind Ye who enter here."

The situation here presented is not different in principle from that involved in *Railroad Company* v. *Tennessee,* 101 U. S. 237, where the State had consented to be sued in a court of law for the purpose of ascertain-

ing the amount due to one claiming to be a creditor, but the only power given to the court was to fix the amount as, in the Rehabilitation and Reinsurance Agreement, in the case of petitioner the amount of benefits to be restored is fixed at $400.00 per month. In the case referred to, the Court was given no authority to enforce the collection of the amount found by it to be due. Your Honors there said:

> "Everything after the judgment depends upon the will of the State. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently, that is not a legal remedy in the legal sense of the term which can only be carried into effect by entreaty."

So in the case here presented, performance is left to the will of the Commissioner and the will of the Directors of the New Company. If they do not will to restore, there is no remedy in a legal sense because petitioner is left to depend solely on entreaty.